SECTION 13

Digests

Sections 13(a) and (b)(2)

Introduction

Board reverses administrative law judge's determination that claimant's claim is barred by laches, holding that because the Act contains a statutory limitation period for filing a claim under Section 13, the doctrine of laches does not apply. Board concludes that under Intercounty Construction Co. v. Walter, 422 U.S. 1, 2 BRBS 3 (1975), claimant's claim, which was timely filed in 1973 and which was never the subject of a formal award, remained open and was sufficient to protect claimant's right to recover for any later disability arising from the August 9, 1971 work-related injury. Lewis v. Norfolk Shipbuilding & Dry Dock Co., 20 BRBS 126 (1987).

The Board held that claimant's 1970 claim for siderosis was still open and pending where the deputy commissioner had exceeded his authority in issuing a 1973 compensation order on the siderosis claim after the effective date of the 1972 Amendments, and an approved settlement had not been achieved. Pursuant to Intercounty, 422 U.S. 1, 2 BRBS 3 (1975), the Board held that the siderosis claim was never the subject of a formal award and remained open and pending. O'Berry v. Jacksonville Shipyards, Inc., 21 BRBS 355 (1988), aff'd in pert. part on recon., 22 BRBS 430 (1989).

Citing Lewis, 20 BRBS 126, and Intercounty, 422 U.S. 1, 2 BRBS 3, the Board held that the administrative law judge properly considered the 1979 and 1983 hearing loss claims as one, as the 1979 claim was timely filed but never adjudicated, and involved the same injury as the 1983 claim. The administrative law judge, therefore, did not err in computing one award for claimant's entire hearing loss and determining the respective liabilities of employer and Director at that time. Krotsis v. General Dynamics Corp., 22 BRBS 128 (1989), aff'd sub nom. Director, OWCP v. General Dynamics Corp., 900 F.2d 506, 23 BRBS 40 (CRT)(2d Cir. 1990).

Citing Krotsis, 22 BRBS 128, the Board held that claimant's 1979 hearing loss claim remained open at the time of the hearing on the 1984 claim, as employer's payment was voluntary and did not constitute a Section 8(i) settlement. Since the claims were for the same injury, the administrative law judge did not err in treating the claims as one, or in computing the full extent of claimant's hearing loss and determining the liabilities of the Director and employer at that time. Balzer v. General Dynamics Corp., 22 BRBS 447 (1989), recon. denied, 23 BRBS 241 (1990)(Brown, J., dissenting on other grounds).

The Board reversed the administrative law judge's finding that claimant's failure to take any further action during the three years following his timely modification request constituted an abandonment of his modification claim. Since claimant filed no written request with the deputy commissioner to withdraw his claim, see 20 C.F.R. §702.255, and the claim was never adjudicated, see Intercounty, 422 U.S. 1, 2 BRBS 3 (1975), it remained open and pending. Madrid v. Coast Marine Construction Co., 22 BRBS 148 (1989).

The Board, in essence, overrules *Rodriguez,* 16 BRBS 371 (1984), in which it held that an "old" claim, which technically remained open, could not be reopened because too much time had passed between the last payment of compensation and the subsequent pursuit of the claim. The Board notes that the doctrine of laches does not apply to cases arising under the Act in view of the specific statutes of limitations provided for in the Act. Therefore, under *Intercounty,* 422 U.S. 1, 2 BRBS 3 (1975), claimant's 1975 timely claim, which was never adjudicated, remains viable and merges with the 1986 claim for disability arising out of the same injury. *Norton v. National Steel & Shipbuilding Co.*, 27 BRBS 33 (1993)(Brown, J., dissenting), *aff'g on recon. en banc* 25 BRBS 79 (1991).

In a claim that was neither withdrawn nor settled pursuant to Section 8(i), the Board held that the administratie law judge erred in relying on *Rodriguez*, 16 BRBS 371, in finding that the 1971 claim could not be adjudicated 25 years later. In light of *Intercounty Construction Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975), and Board decisions post-dating *Rodriguez*, the Board held that the timely claim could be adjudicated, and it remanded the case for a decision on the merits. *Hargrove v. Strachan Shipping Co.*, 32 BRBS 11, *aff'd on recon.,* 32 BRBS 224 (1998).

The parties initially stipulated that claimant was totally disabled, but the first administrative law judge did not issue an order based on these stipulations and there was no adjudication of the claim. Therefore, as no final compensation order was issued in this case, the current claim before the administrative law judge must be viewed as an initial claim for compensation, and Section 22 is not applicable, pursuant to *Intercounty Constr.*, 422 U.S. 1, 2 BRBS 3 (1975). The Board thus reviewed the administrative law judge's disability findings, which he made under Section 22, as though they made in an initial adjudication of claimant's claim. *Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002).

Where claimant sustained an injury to his back and neck in 1990, and the administrative law judge denied permanent partial disability benefits, in a Decision and Order issued in 1996, Section 22 and not Section 13 applies to determine whether the filing of a later claim for temporary total disability benefits for the same injury is timely. Neither party sought reconsideration or appeal of the administrative law judge's decision. Therefore, as Section 22 requires motions for modification to be filed within one year of the date the denial became final, in this case November 1997, claimant is barred from seeking

disability benefits following surgery in 2000, as the time for filing a motion for modification had expired. Section 22 is not implicated merely because claimant sought a different type of benefits in the later filing. *Alexander v. Avondale Industries, Inc.*, 36 BRBS 142 (2002).

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Board rejects employer's argument that although claimant's claim technically is not barred under Section 13 because of employer's failure to file its First Report of Injury under Section 30(a), the claim should be barred under the equitable doctrine of laches. In rejecting this argument Board notes that because the Act contains a specific statutory period for filing a claim under Section 13, the doctrine of laches does not apply. In addition, Board notes that even if the defense were available to employer it would not apply in this because in order for laches to apply, the plaintiff must have unreasonably and inexcusably delayed bringing suit, and the administrative law judge rationally concluded that a 36 year delay in filing under the Act was not unreasonable because claimant had long been injured, had no remedy under the Act until 1962, had lost contact with his attorney, and reasonably presumed that state benefits were his sole remedy. Simpson v. Bath Iron Works Corp., 22 BRBS 25 (1989).

Section 13(a) limits the period in which a claimant may file a claim in order to protect employers and their carriers from having to investigate and defend stale claims. While generally agreeing with the principle that the time limitations of Section 13 should be strictly applied, the Board found this general principle outweighed where this claimant was lulled into a false sense of security by employer regarding the filing requirements for his claim, thereby estopping employer from raising the Section 13(a) defense. Grage v. J.M. Martinac Shipbuilding, 21 BRBS 66 (1988), aff'd on other grounds sub nom. J.M. Martinac Shipbuilding v. Director, OWCP, 900 F.2d 180, 23 BRBS 127 (CRT) (9th Cir. 1990).

Health care provider's mistaken representation to worker that he had seven years within which to file a claim for permanent disability did not estop employer from asserting the Section 13(a) statute of limitations as a defense to the claim, since employer did not lead the worker to believe the provider was its agent under Washington law). *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127 (CRT) (9th Cir. 1990), *aff'g Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66 (1988).

The doctrine of laches does not apply to the statutory scheme. An employer is liable for disability suffered by a deceased employee even though the disability claim was filed after his death by the widow, as the right to disability compensation survives the employee's death. Maddon v. Western Asbestos Corp., 23 BRBS 55 (1989).

Claimant notified his employer immediately after the injury and filed a claim for benefits within the time limits established by Section 13. Employer's carrier, Houston General, paid benefits to claimant for 12 years before disputing liability, claiming INA, another of

employer's carriers, is liable for claimant's benefits. The Board held that neither Section 12 nor Section 13 operates to prevent INA from being held liable, as those sections apply to a claimant's claim for benefits and not to a carrier's request for reimbursement from another carrier. *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004).

The Board holds that employer's failure to file a Section 30(a) report for claimant's synovitis until 1982 did not toll the statute of limitations, inasmuch as employer filed a Section 30(a) report for the traumatic knee injury that led to the synovitis. Employer need not file a new report for all sequelae of the work injury. Since claimant did not file his claim within one year the latest date of awareness advocated, the claim is barred by Section 13. *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd,* 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989).

The Court of Appeals for the Second Circuit affirms the Board's holding that employer's filing of the initial report of injury suffices to prevent tolling of the Section 13 statute of limitations as to all possible sequelae. *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989), *aff'g* 22 BRBS 170 (1989).

The Board remands for the administrative law judge to determine if employer complied with the requirements of Section 30(a), so that the filing period was not tolled, by filing a Form LS-202bT, a "No Lost time Log," rather than a Form LS-202 for a lost time injury, when claimant alleges his back injury was much more serious than a "no lost time injury" and ultimately required surgery. *Hartman v. Avondale Shipyard, Inc.*, 23 BRBS 201 (1990), *vacated on other grounds on recon.* 24 BRBS 63 (1990).

Where claimant was injured on April 27, 1980, entered into a settlement with employer in which employer agreed to pay claimant $54,420 in exchange for a signed release of liability, and later filed a claim for benefits under the Act on April 25, 1985, the Section 13(a) statute of limitations was tolled pursuant to Section 30(f) because employer failed to file a First Report of injury until May 31, 1985. Application of Section 30(f) does not require that employer have definite knowledge that the injury comes within the jurisdiction of the Act and the fact that the case may arise under a statute other than the act (in this case the Jones Act) does not excuse employer's failure to file the Section 30(a) report. *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990).

Following *Ryan*, 24 BRBS 65 (1990), the Board holds that application of Section 30(f) does not require employer to have definite knowledge that the injury comes within the jurisdiction of the Act. Since employer had actual knowledge of claimant's injury and did not file a report until after claimant filed a claim for benefits under the Act, the Board holds that the claim was timely filed. *Spear v. General Dynamics Corp.*, 25 BRBS 132 (1991).

Under the facts of this case, the Board affirms the administrative law judge's finding that claimant's contacts with employer's agent, PMA, were sufficient to impute to employer knowledge of a work injury from which compensation liability was possible. Employer did not dispute the administrative law judge's finding that PMA is its agent. *See Derocher,* 17 BRBS 249 (1985). Since PMA had knowledge of the injury, and employer failed to file a Section 30 report of injury, the statute of limitations for filing a claim was tolled pursuant to Section 30(f), and employer failed to overcome the Section 20(b) presumption. Claimant's claim thus was timely filed. *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991).

Where claimant had not yet lost any time from his work injury when employer completed an LS-202 form, the Board, relying on the Preamble to the Final Rules Implementing the 1984 Amendments and a DOL Notice to employers and carriers, held that that form was not sufficient to satisfy the requirements of Section 30(a) and start the Section 13(a) statute of limitations running. Where an injury does not result in lost time, the employer is not required to file a report and the filing of a report does not cause the time limitation within which a claim must be filed to commence. Where employer's LS-202 failed to specify any loss of time from work, as none had yet occurred and employer did not amend its LS-202 or file a new LS-202 when claimant's injury resulted in loss of time, the Board reversed the administrative law judge's finding that employer filed a report sufficient to satisfy the requirements of Section 30(a). Because employer's failure to comply with Section 30(a) tolls the Section 13(a) filing limitations, the Board reversed the administrative law judge's finding that the claim was barred under Section 13(a). *Nelson v. Stevens Shipping & Terminal Co.*, 25 BRBS 277 (1992) (Dolder, J., dissenting).

The Board affirmed the administrative law judge's finding that the information contained in a medical report and letter from claimant's counsel was sufficient to impute to employer knowledge that claimant suffered from a work-related respiratory impairment for which compensation liability was possible. Because employer's failure to timely file a Section 30(a) report tolls the Section 13(a) statute of limitations, the Board affirmed the administrative law judge's finding that the claim was timely filed. *Bustillo v. Southwest Marine, Inc.,* 33 BRBS 15 (1999).

There is no provision in the Act for protective filing of claims. Thus, where claimants filed claims due to asbestos exposure, but are not yet disabled, their claims cannot be held in abeyance, but must be adjudicated if a party so requests. The court notes that the filing of protective claims is no longer necessary in light of the 1984 Amendments which do not require that a claim be filed until a claimant is disabled. *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12 (CRT)(5th Cir. 1994).

In the instant case, claimant filed a claim in 1987 due to harmful exposure to asbestos, although no disability was alleged. In 1992, employer requested that the district director refer the case to the OALJ for a hearing. After the district director denied employer's request, employer appealed the district director's denial to the Board. Following the Fifth Circuit's holding in *Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12 (CRT)(5th Cir. 1994), and its decision in *Black*, 16 BRBS 138 (1984), the Board held that Section 19(c) imposes a mandatory duty on the district director to order a hearing upon the application of any interested party. *Eneberg v. Todd Pacific Shipyards*, 30 BRBS 59 (1996) (McGranery, J., dissenting).

Where the administrative law judge found that claimant received an audiogram and report in 1988 which showed a 31.88% hearing loss, but she continued to work for employer and be exposed to additional injurious noise, and she underwent another audiogram in 1994 showing a greater loss of hearing, the Board held that claimant's 1994 claim properly included the original 31.88% loss. As claimant's continued employment aggravated her hearing loss, and as each aggravation is a new injury, claimant is entitled to be compensated for the entire loss (the combination of her pre-existing loss and her current loss) under the aggravation rule. Therefore, the Board rejected employer's argument that the claim for the initial 31.88% loss was time-barred pursuant to Sections 8(c)(13)(D) and 13(a), and it affirmed the administrative law judge's conclusion that employer is liable for the entire hearing loss. *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998).

The Fifth Circuit rejects employer's contention that claimant lacked a viable claim at the time he filed his LS-203 claim form. The court stated that claimant had suffered a specific injury, that he was under active medical care prior to the filing, and that he first received a new diagnosis in the months preceding his filing the claim. Citing *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997), and *Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT) (5th Cir. 1994), the court also held that it is not relevant that the claim may have been for prospective disability. The court states that to the extent the Fourth Circuit's decision in *Pettus*, 73 F.3d 523, 30 BRBS 6 (CRT) (4th Cir. 1996), suggests a claimant may seek compensation only for an antecedent period of disability, it is inconsistent with *Rambo*. The court stated that the proper resolution of a claim in which a claimant is found not to be disabled is a denial of benefits on the merits. *Pool Co. v. Cooper,* 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001).

The Fifth Circuit holds that a "claim" does not refer to a "precise category of disability for a fixed period of time," and thus, that a claimant can liberally modify the dates or categories of disability for which he seeks benefits, arising out of a single injury. *Pool Co. v. Cooper,* 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001).

In this case where claimant filed a motion for modification in 1999 and another in 2000, employer argued that the filing in 2000 did not "relate back" to the 1999 filing as required by FRCP 15(c). The Board rejected employer's assertion that the two filings were not sufficiently related so as to allow the administrative law judge to consider them together because the 1999 letter asserted a claim for a nominal award and the 2000 letter asserted a claim "based on different facts" for an award of permanent total disability benefits. The Board held that FRCP 15(c) does not control cases under the Act because: 1) case precedent provides that once a claim is filed, it remains open until adjudicated or withdrawn; 2) the Act provides that an administrative law judge is not bound by technical or formal rules of procedure; and 3) the OALJ regulations specifically allow amendments to pleadings if they are reasonably within the scope of the original complaint. Accordingly, the Board found it unnecessary to resort to FRCP 15(c). The Board also stated in a footnote that, even if FRCP 15(c) applied to cases under the Act in general, it would not accept employer's argument that it did not apply here because under FRCP 15(c), the relation back theory allows amendments to claims when the later claim arises out of the same conduct, transaction or occurrence set forth in the original pleading. Here, all claims originated with the work-related injury. *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002).

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What constitutes a claim?

The Board holds that Dr. Long's chart notes that claimant continues to experience knee pain is not a filing under Section 13 or a request for Section 22 modification because it does not assert a right to compensation. Raimer v. Willamette Iron & Steel Co., 21 BRBS 98 (1988).

The Board rejects employer's argument that the administrative law judge erred in concluding that the filing of claimant's LS-201 Notice of Injury was sufficient to constitute the filing of a claim pursuant to Section 13, noting that a claim need not be on a particular form to satisfy the requirements of Section 13 as long as it disclosed an intention to assert a right to compensation. Peterson v. Columbia Marine Lines, 21 BRBS 299 (1988).

Claimant was awarded permanent partial disability benefits for asbestosis in 1978. He ceased working in February 1991 and filed for modification to change his benefits to permanent total disability based on his average weekly wage at the time he stopped working. The court affirmed the Board's holding that by moving for modification and by arguing that the benefits should be based on his 1991 salary, claimant was necessarily asserting either that he sustained a new injury or an aggravation of his prior injury. Claimant therefore was not required to file a separate formal claim under Section 13. *Bath Iron Works Corp. v. Director, OWCP [Jones]*, 193 F.3d 27, 34 BRBS 1(CRT)(1st Cir. 1999).

In cases involving attorney's fee liability pursuant to Section 28(a), the Board holds that "a claim for compensation" need not include any competent evidence of disability in support of the claim in order to be "valid;" a claim need only be a writing evincing an intent to seek compensation. Thus, a claim for hearing loss benefits need not be accompanied by an audiogram or other evidence demonstrating a loss of hearing. Where Congress has determined that hearing loss claims are to be treated differently than other claims, it has specifically so provided. *Craig, et al v. Avondale Industries, Inc.*, 35 BRBS 164 (2001) (decision on recon. *en banc*), *aff'd on recon. en banc,* 36 BRBS 65 (2002), *aff'd sub nom. Avondale Industries, Inc. v. Alario,* 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003).

The Board rejects employer's contention that claimants did not filed "valid" claims for hearing loss because the uninterpreted audiograms attached to the claim forms are insufficient to meet the "presumptive" evidence standard of Section 8(c)(13)(C) and 20 C.F.R. §702.441, in view of the Board's holding that no evidence need accompany a claim for compensation. Moreover, tests not meeting the "presumptive" standard are not invalid or inadmissable; the administrative law judge is entitled to determine the probative value of such audiograms. *Craig*, *et al. v. Avondale Industries, Inc.*, 36 BRBS 65 (2002), *af'f'g on recon. en banc*, 35 BRBS 164 (2001) (decision on recon. *en banc*), *aff'd sub nom. Avondale Industries, Inc. v. Alario,* 355 F.3d 848, 37 BRBS 116 (CRT)

(5th Cir. 2003).

The Fifth Circuit rejects employer's argument that a valid claim for hearing loss benefits for purposes of triggering employer's liability for attorney fees under Section 28(a) has not been made until the claimant has provided an audiogram and interpretive report that qualify as presumptive evidence of the amount of hearing loss under Section 8(c)(13)(C). A claim need only be a writing that discloses an intention to seek compensation. Form LS-203, filed by claimants, satisfies this requirement. *Avondale Industries, Inc. v. Alario,* 355 F.3d 848, 37 BRBS 116(CRT) (5th Cir. 2003), *aff'g Craig v. Avondale Industries, Inc.,* 35 BRBS 164 (2001) (*en banc*), *aff'd on recon. en banc,* 36 BRBS 65 (2002).

The Board notes that the purpose behind the requirement in Section 13 that the claim be filed with the deputy commissioner is to ensure that employer will receive prompt notification of the claim. The Board did not strictly construe this reporting requirement in the instant case where its purpose was fulfilled. Employer received written notification of an increased hearing loss at the formal hearing, and was given the opportunity post-hearing to submit evidence challenging the claim. Downey v. General Dynamics Corp., 22 BRBS 203 (1989).

An attending physician's report indicating the possibility of a continuing disability, which is filed within one year after the termination of voluntary payments or which is filed while voluntary payments are being made, meets the filing requirement of Section 13(a). The Board therefore reversed the administrative law judge's finding that the attending physician's report must have been generated within the one-year period following the termination of voluntary payments and held that the report may be generated and filed while claimant is receiving voluntary payments. Chong v. Todd Pacific Shipyards Corp., 22 BRBS 242 (1989), aff'd mem. sub nom. Chong v. Director, OWCP, 909 F.2d 1488 (9th Cir. 1990).

Any letter or notice to the deputy commissioner from which it may be reasonably inferred that a claim for compensation is being made is sufficient to constitute a claim under the Act. The Board notes that claimant filed a formal claim prior to the issuance of the administrative law judge's final order. Moreover, claimant's attorney wrote to the district director asking that the letter be construed as a claim against Pac Fish. *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994). *Cf. Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175, 178 (1996)(injury report and hospital discharge report are not claims as they were not filed with district director).

The requirements of Section 13 may be met by any writing from which an inference may reasonably be drawn that a claim for compensation is being made. An attending physician's report indicating the possibility of a continuing disability filed within the requisite time period may meet the requirements, unless the report does not indicate the existence of any disability from work or anticipate any permanent effects. The Board affirms administrative law judge's finding that attending physicians' reports themselves and claimant's testimony established that the reports did not constitute a claim as they deny or are silent as to a permanent effect from the work injury. The Board also affirms administrative law judge's finding that third party tort suit in which employer intervened did not constitute a claim. The Board holds that employer may have been put on notice that a compensation claim might be filed in the future, but since the suit is a claim against a third party, employer was not put on notice that claimant was asserting a right to compensation under the Act. Grant v. Interocean Stevedoring, Inc., 22 BRBS 294 (1989)(Lawrence, J., G., dissenting).

On the unique facts of this case, claimant, the widow of a deceased employee, had the option of filing under Section 9 as it existed prior to the 1984 Amendments based on either her husband's death from an asbestos-related condition or his having been permanently totally disabled at the time of his death due to a work-related back injury. She filed a timely claim, based on her husband's death due to an asbestos-related condition, and almost three years after her husband's death, indicated in writing that she also sought death benefits based on decedent's having been permanently totally disabled at the time of his death. The Board affirmed the administrative law judge's determination that claimant's raising of a new theory under Section 9 constituted a timely amendment of her original claim, upholding the administrative law judge's reasoning, and noting that the amendment's timeliness is determined by that of the original claim and that the U.S. Supreme Court has indicated that liberal amendment of pleadings is to be allowed. *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994).

The Eighth Circuit denied employer’s challenge to the sufficiency of the claim and lack of notice as claimant’s claim alleging an injury to his right knee and pretrial stipulation providing notice to employer that he wished to reserve the right to claim that his knee injury was in the nature of a cumulative trauma, put employer on notice prior to the hearing that there was uncertainty as to the nature of claimant’s injury with a possibility of cumulative trauma. Additionally, three months prior to the hearing, claimant’s counsel sent a letter to the Department of Labor with a copy to the claim representative for employer’s insurer stating that, after having time to consider the injury, the work claimant did at employer and not the accident he had there aggravated his knee condition. Thus, employer had sufficient information on which it could investigate the

claim. *Meehan Service Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied,* 523 U.S. 1020 (1998).

Although claimant's claim for compensation indicates an improper date of injury, by nine days, the court held that it will liberally construe whether a valid claim for compensation has in fact been filed, and that as claimant produced a writing that described the proper injury and alleged that the injury is employment-related with this employer, the claim is valid. *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997).

The Board held that the administrative law judge rationally concluded that claimant's May 1989 letter to the district director clearly indicated an intent to seek compensation despite the fact that it stated it was to provide "notice of claim." The letter addressed claimant's request for disability compensation, medical expenses and an attorney's fee. Follow-up letters and the LS-203 form, which indicated that the claim had previously been filed, supported the administrative law judge's determination that claimant filed his claim for benefits within one year of the date he became aware of the relationship between his traumatic work injury and his disability. Therefore, the Board affirmed the administrative law judge's conclusion that the claim was timely filed. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc,* 32 BRBS 251 (1998).

The Fifth Circuit rejects employer's contention that claimant lacked a viable claim at the time he filed his LS-203 claim form. The court stated that claimant had suffered a specific injury, that he was under active medical care prior to the filing, and that he first received a new diagnosis in the months preceding his filing the claim. Citing *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997), and *Asbestos Health Claimants*, 17 F.3d 130, 28 BRBS 12(CRT) (5th Cir. 1994), the court also held that it is not relevant that the claim may have been for prospective disability. The court states that to the extent the Fourth Circuit's decision in *Pettus*, 73 F.3d 523, 30 BRBS 6 (CRT) (4th Cir. 1996), suggests a claimant may seek compensation only for an antecedent period of disability, it is inconsistent with *Rambo*. The court stated that the proper resolution of a claim in which a claimant is found not to be disabled is a denial of benefits on the merits. *Pool Co. v. Cooper,* 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001).

The Fifth Circuit holds that a "claim" does not refer to a "precise category of disability for a fixed period of time," and thus, that a claimant can liberally modify the dates or categories of disability for which he seeks benefits, arising out of a single injury. *Pool Co. v. Cooper,* 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001).

Where claimant injured his back and neck in 1990 and filed a claim for permanent partial disability benefits which the administrative law judge denied in a Decision and Order issued in 1996, the Board rejected claimant's assertion that his claim for temporary total disability benefits filed in 2000 for the same injury constitutes a "new" claim implicating the provisions of Section 13 instead of Section 22. The Board, following the Fifth Circuit's decision in *Pool Co.*, 274 F.3d 173, 35 BRBS 109(CRT), concluded that a "claim" may consist of requests for multiple types of benefits for an injury and, therefore, a filing cannot constitute a "new claim" merely because it requests a different type of disability benefits from the type originally sought. *Alexander v. Avondale Industries, Inc.*, 36 BRBS 142 (2002).

13-14c

Aware or should have been aware

Board holds that the administrative law judge erred in relying on claimant's testimony to establish the date of awareness of the relationship between decedent's disease, death and employment because the testimony was inherently unreliable, confusing and vague. Because there is no credible evidence to establish a date of awareness, employer has not rebutted the Section 20(b) presumption that the claim was timely filed. The claim is therefore timely as a matter of law. Horton v. General Dynamics Corp., 20 BRBS 99 (1987).

The Fifth Circuit reversed the Board's affirmance of the administrative law judge's finding that claimant had timely filed this claim based upon his finding that the prescriptive period did not begin to run until the date, until approximately 25 months after a work injury, when one of claimant's physicians reported that claimant's neurological problems were caused by a blow to his head rather than his diabetes. The court found this determination unsupported by the record based on claimant's completed and sworn to, but never filed, claim form on which claimant related his head injury to his symptoms. Thus, the one year period in which to file began to run, at the latest, as of the date claimant completed and signed the claim form even though it was never filed. As no claim was filed within one year of this date, the claim is time-barred. *Ceres Gulf, Inc. v. Director, OWCP*, 111 F.3d 17, 31 BRBS 21(CRT) (5th Cir. 1997).

The Board affirmed the administrative law judge's determination that claimant's claim for death benefits was timely filed. Although the claim was filed 14 years after decedent's death, it was filed within one month of reading a doctor's report which linked decedent's employment and his exposure to asbestos to his death from cancer, and this was the first time claimant became aware of the relationship between decedent's disease, death and employment. The Board agreed with the administrative law judge that any warnings regarding asbestos posted at employer's facility, which could have served as "presumed knowledge" to decedent, did not extend to claimant. *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001).

Claimant (decedent's widow) filed a claim for death benefits 3 years after her husband's death due to stomach cancer in 1996. At the behest of claimant's attorney, a physician examined decedent's medical records and his pathology specimens and concluded that decedent had died of mesothelioma due to long-term exposure to asbestos. The First Circuit affirmed the administrative law judge's finding that claimant credibly testified that she first realized that there was a connection between her husband's death, asbestos, and her husband's job after reading the report in 1999. Therefore, the court affirmed the administrative law judge's conclusion that claimant had no reason to believe, much less suspect, that there existed a relationship between her husband's disease, his death, and his employment until 1999, and held that employer has not rebutted the Section 20(b) presumption that the claim was timely filed in 1999. *Bath Iron Works Corp. v. U.S. Dept. of Labor [Knight]*, 336 F.3d 51, 37 BRBS 67(CRT) (1st Cir. 2003).

Effect of Diagnosis

The Board reverses administrative law judge's finding that claimant was first aware of the relationship between his silicosis and his employment in October 1983 when he received Dr. Simon's diagnosis, in view of the evidence indicating claimant's earlier awareness that he suffered from a work-related condition. The date on which claimant is informed by a doctor that he has a work-related condition is not always controlling. Remand for administrative law judge to determine the date of claimant's disability and the date of his awareness of the relationship between his employment, disease and disability and then to decide whether claim was timely filed under Section 13. Pryor v. James McHugh Construction Co., 18 BRBS 273 (1986).

Court affirms administrative law judge's finding that claimant's date of "awareness" was at least four years before he filed his claim in 1980, as it is supported by substantial evidence of record. Claimant testified that he believed the air in the pressroom was making his respiratory problems worse; that from his first day at work, he coughed up a black substance; that he wore a breathing mask for protection; that his doctor recommended in 1975 that he retire; that he did retire in 1976; that he retained an attorney in 1976 to represent him in a workers' compensation action; that he opted out of a class action against employer regarding lung conditions because he thought his was more serious; and that he did not file because his medical expenses were not large. Stark v. Washington Star Co., 833 F.2d 1025, 20 BRBS 40 (CRT) (D.C. Cir. 1987).

Although the date a doctor tells claimant his injury is work-related can be determinative, the appropriate date of awareness is the time claimant should have been aware of such a relationship. The Board affirms the finding that claimant should have been aware when he told his doctor of the accident and related his knee problems to the accident. Aurelio v. Louisiana Stevedores, Inc., 22 BRBS 418 (1989), aff'd mem., 924 F.2d 1055 (5th Cir. 1991)(table).

Neither the Act nor regulations require that claimant's awareness be based on a medical opinion. Because Section 13(b)(2) is unequivocally written in the disjunctive, *i.e.*, claimant has two years to file from actual awareness *or* from the date she should have been aware by reason of medical advice, the Board holds that the administrative law judge did not err as a matter of law in determining the date of claimant's' awareness based upon her personal opinion. Moreover, substantial evidence supports the administrative law judge's finding of date of awareness based on numerous statements made and actions taken. As claimant did not file within two years of her date of awareness, the Board affirms the finding that the claim was untimely. *Wendler v. American National Red Cross*, 23 BRBS 408 (1990) (McGranery, J., dissenting).

Economic Factors/Misdiagnosis

The Board holds that Stancil v. Massey, 436 F.2d 274 (D.C. Cir. 1970) will be applied as written in D.C. Circuit cases. Thus for Section 13 purposes, the statute of limitations does not begin to run until claimant is aware of a work-related harm which will probably diminish his earning capacity. In cases outside the D.C. Circuit, the Board has limited Stancil to situations where claimant receives a misleading diagnosis or incorrect prognosis from a physician which reasonably leads him to believe his condition is not serious. The Board remands in this case for a determination as to when claimant was aware that his work-related harm would diminish his earning capacity. Taylor v. Security Storage of Washington, 19 BRBS 30 (1986).

The statute of limitations for Section 13(a) begins only when the employee knows or should know that (1) his injury is causally related to his employment and (2) his injury is impairing his capacity to earn wages. The court affirms the finding that the claim was timely filed as claimant was not aware of an adverse impact on his earning capacity until the day the doctor recommended that he retire, in view of claimant's good attendance record, his non-strenuous job, and normal chest x-rays. Bechtel Associates, P.C. v. Sweeney, 834 F.2d 1029, 20 BRBS 49 (CRT)(D.C. Cir. 1987).

Court holds that claimant should have been aware of the connection between his disability, his disease, and his employment once he missed work because of his disease--i.e., once his disease resulted in economic effects. Argonaut Insurance Co. v. Patterson, 846 F.2d 715, 21 BRBS 51 (CRT) (11th Cir. 1988), aff'g in part and rev'g in part Patterson v. Savannah Machine & Shipyard, 15 BRBS 38 (1982) (Ramsey, C.J., dissenting).

The Board affirms the administrative law judge's finding that the claim was timely filed. Claimant was not "aware" until 1983 that the work-related effects of his injury caused a loss in wage-earning capacity. There is also no evidence that claimant was aware that all the symptoms he was experiencing were due to the work injury until that time. Forlong v. American Security & Trust Co., 21 BRBS 155 (1988).

Where claimant receives a misdiagnosis or incorrect prognosis which reasonably leads him to believe his condition is not work-related or will not affect his wage-earning capacity, claimant is not "aware" until he secures a correct diagnosis. In light of an erroneous medical opinion that claimant's condition had stabilized without residual permanent effect, the absence of an effect on wage-earning capacity until a subsequent medical opinion was offered, and the Section 20(b) presumption, the Board reverses administrative law judge's finding that the claim was untimely under Section 13. Caudill v. Sea Tac Alaska Shipbuilding, 22 BRBS 10 (1988), aff'd mem. sub nom. Sea Tac

Alaska Shipbuilding v. Director, OWCP, 8 F.3d 29 (9th Cir. 1993).

The Board rejects claimant's argument that prior misdiagnoses in this case meant that statute of limitations did not begin to run until he received the proper diagnosis. Applying Lunsford, 733 F.2d 1139, 16 BRBS 100 (CRT)(5th Cir. 1984), the Board holds that claimant's injury, as described in Lunsford, is one that resulted in a significant disability for which no claim is filed until the disability became even greater. Pursuant to Lunsford, therefore, claimant should have filed for benefits as soon as he was aware that the work injury would affect his wage-earning capacity. Misdiagnosis is not a basis for tolling the statute of limitations where claimant's wage-earning capacity is continuously affected as a result of the work injury. Grant v. Interocean Stevedoring, Inc., 22 BRBS 294 (1989)(Lawrence,J., G., dissenting).

The Board rejects claimant's contention that Lunsford applies in this case, noting that the Board has held that the requirement that claimant know of an adverse effect on wage-earning capacity applies only when claimant's condition was initially misdiagnosed. Since the diagnoses in this case were correct, Lunsford does not apply. Aurelio v. Louisiana Stevedores, Inc., 22 BRBS 418 (1989), aff'd mem., No. 90-4135 (5th Cir. March 5, 1991).

The Board reversed the administrative law judge's finding that claimant was aware of the true nature of her injury where claimant returned to work after missing time due to pain caused by her injury, worked despite pain for almost a year, and was initially told by her doctor that she would get better. Claimant was not aware until she learned of the true nature of her condition and of a possible permanent impairment of her earning capacity. The Board concluded that the claim was timely filed. *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

The Board vacates the administrative law judge's finding that the claim for an injury to claimant's left shoulder was barred by Sections 12 and 13, and remands for the administrative law judge to reconsider whether the claim is time-barred, affording claimant the benefit of the Section 20(b) presumption. In reconsidering the evidence regarding claimant's date of awareness, in light of employer's burden of proof, the administrative law judge must consider whether the evidence suggests that claimant received a misdiagnosis reasonably leading him to believe that his left shoulder pain upon returning to work, he should have been aware that he had injured this shoulder in his work accident. *Bivens v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 233 (1990).

The Eleventh Circuit held that the statute of limitations under Section 13(a) does not begin to run until claimant is aware of the full character, extent and impact of the harm he has suffered and that there was an injury which constituted an impairment of earning power. Therefore, the test is claimant's awareness that he has suffered a compensable injury and not that he has suffered an accident, and is aware that he is injured. The court rejected employer's assertion that the statute of limitations is tolled only where there has been an initial misdiagnosis and held that the real issue which determines when the statute of limitations begins to run is whether the employee reasonably believes that he was not physically disabled. *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT) (11th Cir. 1990).

The time for filing a claim does not begin to run until the employee is aware, or should have been aware, of the relationship between the injury and the employment. In the instant case, the administrative law judge erroneously viewed the time for filing as triggered by when the employee knew he was temporarily unable to work, as the employee did not yet know of that time of the full extent of his work-related harm. The period was tolled until claimant knew his disability permanent as it was then that he knew the full character, extent and impact of his injury. *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127 (CRT) (9th Cir. 1990), *aff'g Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66 (1988).

The D.C. Circuit held that where the administrative law judge found a claim to be barred under Section 13(a) because he determined that claimant was immediately aware his injury was job-related, the administrative law judge applied the wrong legal standard. Since evidence existed in the record from which the administrative law judge could determine that claimant reasonably believed his condition would not adversely affect his earning capacity, the case was remanded for the administrative law judge to ascertain at what point claimant knew or should have known that his condition would affect his ability to earn his previous wage, as it is only then that claimant could be "aware." *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT) (D.C. Cir. 1990).

The Fourth Circuit holds that the standard for determining whether the statute of limitations begins to run is whether the claimant is aware that his injury is likely to impair his earning capacity. In this case, claimant was able to work for 25 years after his injury, even though he had pain, and it was not until surgery was arranged that he knew that the injury would impair his earning capacity. *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98 (CRT) (4th Cir. 1991).

The Ninth Circuit reverses the Board's decision that claimant failed to file a timely claim pursuant to Section 13(a). The court noted its disagreement with the Board's interpretation that claimant's awareness of a work-related injury which may diminish his wage-earning capacity is relevant only when a physician misdiagnoses the work-related nature of a claimant's injury or issues an incorrect prognosis. The court concluded that under the Todd Shipyards v. Allan standard, claimant is not "aware" of his injury for purposes of Section 13(a) (and therefore, the statute of limitations does not begin to run) until he is reasonably aware of the full character, extent and impact of his work-related injury. In this case, claimant relied on his doctor's advice that his knee injury would heal, and was not aware of the full extent of his work injury until rest did not improve the condition and claimant was advised to see a surgeon. *Abel v. Director, OWCP,* 932 F.2d 819, 24 BRBS 130 (CRT) (9th Cir. 1991).

In a case where claimant suffered a work-related injury but continued to perform his usual work for several years until his condition deteriorated to the point of requiring surgery, and where his condition was misdiagnosed, the Board affirmed the administrative law judge's finding that the time for filing a claim under Section 13(a) did not commence to run until he became aware of the true nature of the condition, *i.e.*, that the condition interferes with his employment by impairing his capacity to work and is related to his employment. *Gregory v. Southeastern Maritime Co.*, 25 BRBS 188 (1991).

The Eighth Circuit adopts the reasoning of other circuit courts and holds that the Section 13 time limitation does not begin to run until the injured employee becomes aware of the full character, extent and impact of the harm done as a result of the work injury. In this case, claimant was not aware under this standard until employer refused to re-hire him after a pre-employment physical exam following a layoff. *Duluth, Missabe & Iron Range Ry. Co. v. Director, OWCP*, 43 F.3d 1206, ___ BRBS ___ (CRT) (8th Cir. 1994).

The Sixth Circuit adopts the reasoning of the other courts of appeals and holds that the Section 13 statute of limitations begins to run only after the employee becomes aware or reasonably should have become aware of the full character, extent and impact of the injury, which is when the employee knows or should know that the injury is work-related and that it will impair his earning capacity. In this case, claimant continued to work for several years following his recuperation from four separate work-related back injuries, and although he missed work temporarily and regularly experienced back pain, it was not until his herniated discs were diagnosed and he was unable to work that he was put on notice of a likely permanent impairment of his long-term earning capacity. Claimant's claim was timely filed within one year of this time. *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33 (CRT) (6th Cir. 1996).

The Board affirmed the administrative law judge's finding, pursuant to *Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991), that claimant did not become aware of a likely impairment of his wage-earning capacity from his September 1995 right eye injury until 1999, when claimant first noticed vision clouding and underwent unsuccessful surgery. Prior thereto, claimant was able to perform his usual employment as a welder, he had essentially normal vision, and laser surgery to remove corneal scarring was not recommended. Thus, claimant's claim, filed in 1999, was timely. *Hodges v. Caliper, Inc.*, 36 BRBS 73 (2002).

The Board rejected employer's contention that *Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991), was superceded by the Supreme Court's decision in *Rambo II.* The statements regarding Section 13(a) by the Court in *Rambo II* are *dicta*, as the case solely addressed Section 22, and therefore are inapplicable to this claim. Moreover, employer's contention that claimant had to file for a *de minimis* award prior to becoming aware of a likely impairment of his wage-earning capacity would yield a result contrary to the Court's holding in *Rambo II*, which approved *de minimis* awards to, in effect, indefinitely extend the limitations period of Section 22. In addition, the standard for establishing entitlement to a *de minimis* award and for filing a claim under Section 13(a) are quite similar. Both standards require some evidence of a likely impairment of earning capacity. Finally, the awareness standard of Section 13(a) demonstrates the intent that claimants with latent traumatic injuries not be required to file until they are aware of a likely impairment of earning capacity; the statute of limitations does not run from the date of accident. *Hodges v. Caliper, Inc.*, 36 BRBS 73 (2002).

The Board affirmed the administrative law judge's finding that claimant did not become aware of the full impact of the 1984 work-related traumatic injury to his knee until a doctor performed arthroscopic surgery in 1989 and discovered that claimant had a torn medial meniscus. Prior thereto, claimant had, in effect, been misdiagnosed, and he had continued to work in his usual employment. Consequently, the Board affirmed the administrative law judge's conclusion that claimant's May 1989 claim was filed in a timely manner. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

Occupational Disease

Claimant's claim, which was not filed within one year of awareness of a compensable injury, was untimely, as the 1984 Amendments to the Act, which provide a two-year period of limitations for occupational diseases, do not apply to cases arising under the 1928 D.C. Act. *Pryor v. James McHugh Construction Co.*, 27 BRBS 47 (1993).

In an occupational disease case, the time limitations of Section 13(b)(2) do not begin to run until claimant is actually disabled by his condition, or in the case of a voluntarily-retired employee, until permanent impairment exists. The Board therefore reversed the administrative law judge's finding that claimant had to file his claim within two years after he became aware of his work-related disease and the likelihood of a future loss in earning capacity. The claim is timely, as it was filed within two years of the time claimant became unable to perform his duties because of work-related respiratory problems. Curit v. Bath Iron Work Corp., 22 BRBS 100 (1988).

In an occupational disease case, the Board notes that the statute of limitations does not begin to run until claimant is aware or should be aware of the relationship between the employment, the disease and the disability, which in the case of a voluntary retiree means permanent impairment. The Board remands the case, as the administrative law judge made no findings regarding when claimant became aware that his pulmonary condition resulted in permanent impairment. Lombardi v. General Dynamics Corp., 22 BRBS 323 (1989).

Where an employee was exposed to asbestos beginning in the early 1950's, learned of his contraction of asbestosis and the hazards of asbestos exposure in the 1970's and filed a claim for compensation in 1984, the Board held that neither Section 12 nor 13 bars the claim as the record evidence supports the administrative law judge's finding that claimant was not aware of the relationship between his employment, his disease and his disability until Oct. 1984. The limitations period begins to run only when an employee becomes aware of the relationship between his employment, his disease and an actual disability which impairs his wage-earning capacity. In this case, claimant was told there was no contraindication of his continuing to work. Moreover, the Board rejected employer contention that the date of awareness can occur when an employee becomes aware of a potential disability, and distinguished *Thorud*, 18 BRBS 232 (1986), and limited it to its facts as it involved a responsible carrier issue and not Section 12 or 13. *Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993).

The Board holds that claimant's chronic synovitis is not an occupational disease entitling him to the extended statute of limitations inasmuch as the condition does not have the characteristics of an occupational disease: unexpectedness, *i.e.,* an inherent hazard of continued exposure to conditions of employment, and gradual, rather than sudden onset. As claimant did not timely file a claim within one year of his date of awareness, the Board affirmed the finding that the claim is time-barred. *Gencarelle v. General Dynamics Corp.,* 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989).

The Second Circuit affirms the Board's holding that claimant is not entitled to the extended statute of limitations for occupational diseases, as claimant's condition does not meet the criteria. The employee must have a disease caused by hazardous conditions of employment, which are peculiar to one's employment as opposed to other employment generally. Hazardous activity need not be exclusive to one's employment, but it must be sufficiently distinct from hazardous conditions associated with other types of employment. Claimant alleged that his chronic synovitis was the result of repetitive trauma-bending, stooping, climbing-required by his maintenance position with employer. The Second Circuit held that claimant's activities were not "peculiar to" his employment, since these activities are common to many occupations and life in general. *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989), *aff'g* 22 BRBS 170 (1989).

The word "employment" as it is used in Section 13(b)(2) of the Act necessarily refers to employment covered under the Act for which employer is potentially responsible. Thus, in occupational disease cases the time limitations of Section 13(b)(2) do not begin to run until the claimant or employee is aware of the relationship between his *covered* employment, the disease, and the death or disability. In this case, as there is no evidence that decedent was ever aware of the relationship between his covered employment and his lung cancer, the Section 20(b) presumption is not rebutted and the administrative law judge's finding that the *inter vivos* claim was untimely is reversed. The administrative law judge relied on evidence that decedent might have known of the relationship between his cancer and his post-maritime employment as a roofer wherein he also was exposed to asbestos. *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990)(Dolder, J., concurring in the result only).

The Board affirms the administrative law judge's finding that decedent's *inter vivos* claim is barred. The administrative law judge rationally inferred that decedent should have been aware of the relationship between his employment, his disease and his disability no later than Nov. 1, 1984, based on medical reports that related the asbestosis to occupational exposure and stated he was impaired. The case is distinguished from *Martin*, 24 BRBS 112 (1990), because decedent herein was never told that his disease was related only to non-covered employment. *Maes v. Barrett & Hilp*, 27 BRBS 128 (1993).

Claimant's notice and claim under Sections 12 and 13 were timely where, although claimant had been advised by a physician in 1983 of the "possibility" that he had work-related lung disease, he was not aware nor should have been aware that he had an employment-related lung condition until 1988, when Dr. Barnhart diagnosed work-related asbestosis or "asbestos-related pleural disease;" the administrative law judge noted that all of claimant's symptoms were consistent with his preexisting non-work-related chronic diseases, previous medical opinions regarding the cause of claimant's respiratory problems were inconclusive and at least one physician had informed claimant that his condition was not work-related. Moreover, there was no indication that claimant had any permanent impairment, required where claim involves a voluntary retiree, until Dr. Barnhart's impairment rating in 1992. *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154, 156 (1996).

The Board holds that the extended time limitations for occupational diseases apply to hearing loss claims. Manders v. Alabama Dry Dock & Shipbuilding Corp., 23 BRBS 19 (1989). But see Vaughn v. Ingalls Shipbuilding, Inc., 28 BRBS 129 (1994) (en banc), aff'g on other grounds 26 BRBS 27 (1992) (under Bath Iron Works Corp. v. Director, OWCP, ___ U.S. ___, 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993) hearing loss is not an

occupational disease which does not immediately result in disability so extended limitations are not applicable).

The Eleventh Circuit holds, consistent with Section 8(c)(13)(D), that in a hearing loss case, the employee must both receive an audiogram and be aware of the connection between the disability and the employment before the statute of limitations begins to run. *Alabama Dry Dock & Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 24 BRBS 229 (CRT) (11th Cir. 1991).

The Board held that oral explanation of the results of an audiogram will not suffice as an accompanying report and that claimant's actual physical receipt of the audiogram and written accompanying report is required under Sections 12 and 13 of the Act. Accordingly, the Board vacated administrative law judge's finding to the contrary. Because the earliest possible date that claimant received an audiogram and accompanying written report in this case occurred on January 6, 1986, the Board modified the administrative law judge's decision to reflect this date of awareness under Section 8(c)(13)(D) and affirmed the administrative law judge's determination that the notice provided to SAIF on February 13, 1986, and the claim dated January 11, 1986, but filed on February 11, 1986, were timely pursuant to Sections 12 and 13. *Mauk v. Northwest Marine Iron Works*, 25 BRBS 118 (1991).

The Board holds that counsel's receipt of an audiogram is not constructive receipt by the employee, as Section 8(c)(13)(D) states that the Section 12 and 13 time limitations do not begin to run until claimant has physical receipt of an audiogram and accompanying report indicating a loss of hearing. *Vaughn v. Ingalls Shipbuilding, Inc.*, 26 BRBS 27 (1992), *aff'd on recon. en banc*, 28 BRBS 129 (1994).

The Board rejects employer's agency and constructive receipt arguments, holding that Congress specified that the statute of limitations periods in hearing loss cases do not begin to run until the employee is given a copy of the audiogram and the accompanying report. *Vaughn v. Ingalls Shipbuilding, Inc.*, 28 BRBS 129 (1994) (*en banc*), *aff'g* 26 BRBS 27 (1992).

The Board holds that a letter accompanying an audiogram, which indicates that claimant has "fair" and "below normal" hearing and is silent as to any employment connection, stating only that due to noise surveys conducted by employer claimant should wear earplugs, is inadequate to constitute an accompanying report which would trigger the running of the Section 13 time limitations. Such a letter is insufficient to confer "awareness" of an employment-related hearing loss as contemplated by the

statute. Moreover, Section 8(c)(13)(C) and 20 C.F.R. §702.441, setting out the requirements for an audiogram to be presumptive evidence of the amount of hearing loss, is not related to timeliness determinations under Sections 8(c)(13)(D), 12 and 13. *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995).

The Board affirms the administrative law judge's finding that the claim was timely filed under the rationale of Smith v. Aerojet General, 647 F.2d 518, 13 BRBS 391 (5th Cir. 1981), inasmuch as claimant timely filed a claim against the United States within one year of decedent's death and immediately amended the claim to name employer, once she received the updated Social Security records. Shaller v. Cramp Shipbuilding & Dry Dock Co., 23 BRBS 140 (1989).

Because the Fifth Circuit, in whose jurisdiction this case arises, has stated that the time limitations of Sections 12 and 13 do not begin to run against a previous employer where the employee timely files a claim against a later employer until the employee is aware that liability could be assessed against that particular employee under the last employer doctrine, *see Smith v. Aerojet General*, 647 F.2d 518, 13 BRBS 391 (5th Cir. 1981), the administrative law judge's erred in finding the claim against Avondale barred. *Carver v. Ingalls Shipbuilding, Inc.*, 24 BRBS 243 (1991).

The Board reversed the administrative law judge's finding that the death benefits claim filed in 1992 was timely filed in this asbestosis case after holding that claimant was or should have been aware on the date of his death in May 1987 that her husband's death due to mesothelioma was related to asbestos exposure at work since she knew before his death that the disease was caused by asbestos exposure, that he was exposed to asbestos at work, and that the disease was fatal. The Board rejected the administrative law judge's reasoning, based on *Smith* and *Osmundsen,* that claimant had to be aware of the relationship between a specific covered employment and the disease and death. *Blanding v. Oldam Shipping Co.*, 32 BRBS 174 (1998), *rev'd in pert. part sub nom. Blanding v. Director, OWCP,* 186 F.3d 232, 33 BRBS 114(CRT)(2d Cir. 1999).

The Second Circuit reversed the Board's holding in *Blanding v. Oldam Shipping Co.*, 32 BRBS 174 (1998), that the death benefits claim was not timely filed, holding that employer and carrier did not rebut the Section 20(b) presumption. The court held that the carrier's controversion indicating that the date employer learned of the decedent's death was "unknown" was insufficient to rebut the presumption as it does not indicate that employer lacked knowledge of the decedent's work-related death before the claim was filed in 1992, and as there is no evidence in the record indicating when the carrier

learned of the decedent's death. The court also held that claimant's returned claim form (undeliverable by the post office) did not constitute substantial evidence that employer lacked knowledge of the decedent's work-related death before 1992, and that the carrier presented no evidence that it lacked knowledge of the decedent's work-related death prior to 1992. Lastly, the court held that employer and carrier's failure to file a Section 30(a) report tolled the statute of limitations under Section 30(f). Thus, the court reinstated the administrative law judge's award of death benefits *Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999), *rev'g in pert. part* 32 BRBS 174 (1998).

Inasmuch as the administrative law judge properly set out and applied the legal standard espoused in *Gencarelle*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989), and *LeBlanc*, 130 F.3d 157, 31 BRBS 195(CRT) (5th Cir. 1997), for determining whether there exists an occupational disease, and as the evidence supports the determination that the conditions of claimant's employment were "peculiar to" that employment, the Board affirms the finding that claimant's carpal tunnel and cubital tunnel syndromes are occupational diseases subject to the extended statute of limitations at Sections 12(a) and 13(b)(2). Moreover, as the evidence of record supports the finding that the claim was timely filed under these provisions, the finding that the claim is not time-barred is affirmed. *Carlisle v. Bunge Corp.,* 33 BRBS 133 (1999), *aff'd,* 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000).

The Seventh Circuit adopts the standard for determining occupational disease used by the Second Circuit in *Gencarelle,* 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989), and the Fifth Circuit in *LeBlanc*, 130 F.3d. 157, 31 BRBS 195(CRT) (5th Cir. 1997): a gradual condition arising out of exposure to harmful conditions of employment when those conditions are present in a peculiar or increased degree by comparison to employment generally. As the administrative law judge's finding that claimant's repetitive hand and arm movements were due to more than a normal amount of use of joy sticks at work is supported by substantial evidence, the court affirmed the use of the two-year statute of limitations for claimant's carpal tunnel syndrome. *Bunge Corp. v. Carlisle,* 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000), *aff'g* 33 BRBS 133 (1999).

The Board affirmed the administrative law judge's determination that claimant's claim for death benefits was timely filed. Although the claim was filed 14 years after decedent's death, it was filed within one month of reading a doctor's report which linked decedent's employment and his exposure to asbestos to his death from cancer, and this was the first time claimant became aware of the relationship between decedent's disease, death and employment. The Board agreed with the administrative law judge that any warnings regarding asbestos posted at employer's facility, which could have served as "presumed knowledge" to decedent, did not extend to claimant. *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001).

Claimant (decedent's widow) filed a claim for death benefits 3 years after her husband's death due to stomach cancer in 1996. At the behest of claimant's attorney, a physician examined decedent's medical records and his pathology specimens and concluded that decedent had died of mesothelioma due to long-term exposure to asbestos. The First Circuit affirmed the administrative law judge's finding that claimant credibly testified that she first realized that there was a connection between her husband's death, asbestos, and her husband's job after reading the report in 1999. Therefore, the court affirmed the administrative law judge's conclusion that claimant had no reason to believe, much less suspect, that there existed a relationship between her husband's disease, his death, and his employment until 1999, and held that employer has not rebutted the Section 20(b) presumption that the claim was timely filed in 1999. *Bath Iron Works Corp. v. U.S. Dept. of Labor [Knight]*, 336 F.3d 51, 37 BRBS 67(CRT) (1st Cir. 2003).

Voluntary Payments

The Board affirms the administrative law judge's finding that employer's payment of claimant's full salary during claimant's hospitalizations was not intended as compensation. The statute of limitations therefore was not tolled until one year after the date of the last payment of this salary. Taylor v. Security Storage of Washington, 19 BRBS 30 (1986).

The Board upheld the administrative law judge's summary judgment ruling dismissing the claim where claimant filed beyond the mandatory one year after last voluntary payment time frame of Section 13(a). The Board rejected claimant's contention that the one year period should begin to run on the date claimant became aware of employer's erroneous calculation of claimant's average weekly wage resulting in underpayment of compensation. Daigle v. Scully Bros. Boat Builders, Inc., 19 BRBS 74 (1986).

The Board affirms the administrative law judge's finding that the widow's claim was timely filed under Section 13 because it was filed while voluntary Section 9 death benefits were being paid to her two minor children. The administrative law judge found that Section 9 provides only for one death benefit, with differing distributions depending upon who the survivors are. There is no requirement in Section 13 that payments to a specific survivor toll time limits only with regard to that individual. Lewis v. Bethlehem Steel Corp., 19 BRBS 90 (1986).

Claimant's claim was not barred since he was receiving state workers' compensation benefits when his claim under the Act was filed. Since the purposes of Section 13(a) would not be furthered by the barring of the claim under these circumstances, the payments under the state act toll the provisions of Section 13(a). The Board rejected employer's contention that the payment of compensation must be in accordance with the Section 2(2) definition of "compensation" as money payable "as provided for in this Act." In this case, employer chose to pay claimant under the state act, and there was no danger of a stale claim, etc. Smith v. Universal Fabricators, Inc., 21 BRBS 83 (1988), aff'd, 878 F.2d 843, 22 BRBS 104 (CRT) (5th Cir. 1989), cert. denied, 493 U.S. 1070 (1990).

The court affirms the Board's holding that the claim is not barred as his Longshore Act claim was filed while employer was making voluntary payments under the state act. Universal Fabricators, Inc. v. Smith, 878 F.2d 843, 22 BRBS 104 (CRT)(5th Cir. 1989), aff'g 21 BRBS 83 (1988), cert. denied, 493 U.S. 1070 (1990).

Where claimant's receipt of state benefits occurs after the Section 13 statute limitations has run, the rationale of Saylor, 9 BRBS 561, and Smith, 21 BRBS 83, does not apply and the running of the statute is not tolled. In those cases, the Board held that receipt of state benefits tolled the running of the statute, just as the receipt of Longshore benefits does, because employer is aware of claimant's injured condition. Here, the last payment under the Act was in July 1979, the state and Longshore claims were filed in Oct. 1980, and a lump sum payment under a state award occurred in 1982. Colburn v. General Dynamics Corp., 21 BRBS 219 (1988).

The Board construes the word “award” in the phrase “without an award” in Section 13(a) as meaning an award under the Act. Thus, where payment is made without an award under the Act, a claim is timely if filed within one year of the last payment. In this case, employer’s payment pursuant to a state compensation award constitutes a payment without an award under the Act and the statute of limitations was therefore tolled until one year after employer’s last payment. Accordingly, the Board reverses the administrative law judge’s finding that the claim filed within one year of employer’s last payment pursuant to a state compensation award was not timely. *Reed v. Bath Iron Works Corp.*, 38 BRBS 1 (2004).

An attending physician's report indicating the possibility of a continuing disability, which is filed within one year after the termination of voluntary payments or which is filed while voluntary payments are being made, meets the filing requirement of Section 13(a). The Board therefore reversed the administrative law judge's finding that the attending physician's report must have been generated within the one-year period following the termination of voluntary payments and held that the report may be generated and filed while claimant is receiving voluntary payments. Chong v. Todd Pacific Shipyards Corp., 22 BRBS 242 (1989), aff'd mem. sub nom. Chong v. Director, OWCP, 909 F.2d 1488 (9th Cir. 1990).

The Board affirmed administrative law judge's finding that payments under an employer's short-term disability plan or for unused vacation time are not payments of compensation under the Act sufficient to toll the Section 13(a) period. *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

As the lending employer continued to make voluntary payments, the Section 13(a) statute of limitations for a claim being filed against borrowing employer would not commence until one year from the last payment of compensation. *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994).

Section 13(c)

The Board held that the term "minor," which is not defined by the Act, and which has no clear common meaning, must be defined by appropriate state law, as there is no "federal common law." Thus, the administrative law judge erred in relying on the Act's definition of "child" at Section 2(14) to determine whether this claim was timely, as the terms must have different meanings. In this case, the use of Mississippi law is proper for defining the term "minor," and Mississippi has established the age of 21 as the age of majority. Because claimant herein was two when decedent died, and because claimant did not have an appointed guardian for purposes of filing a claim under the Act, her claim for death benefits filed within one year of her 21st birthday was filed in a timely manner. Consequently, the Board reversed the administrative law judge's decision and remanded the case for consideration on the merits. *Smith v. Shell Offshore, Inc.*, 33 BRBS 161 (1999).

Section 13(d)

A claim filed against employer within one year of the date that claimant's third party tort action was dismissed is timely pursuant to Section 13(d). *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994).

The First Circuit noted as *dictum* its doubts about the validity of the holding in *Ingalls Shipbuilding Div., Litton Systems, Inc. v. Hollinhead,* 571 F.2d 272, 8 BRBS 159 (5th Cir. 1978), that the filing of a state workers' compensation claim is considered to be a suit for damages as contemplated by Section 13(d) sufficient to toll the Section 13(a) limitations period. *Bath Iron Works Corp v. Director, OWCP [Acord],* 125 F.3d 18, 31 BRBS 109(CRT) (1st Cir. 1997).

The Board holds that the filing of an untimely state claim cannot toll the statute of limitations under the Act pursuant to Section 13(d). In this case, claimant sustained an injury in October 1980 and became aware of the full impact of his injury in August 1983. His state claim, which was filed in February 1984, would have been timely under the Act, but was untimely under the state law. Consequently, the Board held that claimant's claim under the Act, which was filed in June 1992, during the pendency of the state claim, was untimely under Section 13, as Section 13(d) did not toll the statute of limitations for filing a claim under the Act. The Board distinguished this case from the Fifth Circuit's decision in *Hollinhead*, 571 F.2d 272, 8 BRBS 159, and the Board's decision in *Calloway,* 16 BRBS 175. Therefore, the Board affirmed the administrative law judge's denial of claimant's claim for disability benefits, as it was filed in an untimely manner. *Hill v. Avondale Industries, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom. Hill v. Director, OWCP,* 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied,* 120 U.S. 2215 (2000).

The Fifth Circuit affirmed the Board's holding that the statute of limitations is not tolled by the provisions of Section 13(d) where claimant's state claim was held to be untimely filed under the state workers' compensation law. The court distinguished this case from the decisions in *Hollinhead,* 571 F. 2d 272, 8 BRBS 159, and *Calloway*, 16 BRBS 175. *Hill v. Director, OWCP,* 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *aff'g* 32 BRBS 186 (1998), *cert. denied*, 120 S.Ct. 2215 (2000).